



Practical implications

of bedroom tax appeals

Introduction

This guide covers the grounds on which you can appeal against the bedroom tax (social size criteria) and the practical implications of making such an appeal. You can use it if you are affected by the bedroom tax yourself and wish to appeal or to help a tenant who wants to appeal. Throughout guide the word 'you' refers to the tenant/claimant who is making the appeal and not to any other person in the household.

In this document:

- 'your council' means the local authority that pays your housing benefit (HB)
- 'registered housing association' means a landlord who is a housing association that is registered with the Homes and Communities Agency in England, or the Scottish Government or Welsh Government in Scotland and Wales respectively
- 'council tenant' means your landlord is the local authority that pays your HB (and not any other local authority such as an English county council)
- 'supported housing' means your landlord provides you with care, support or supervision directly (from your landlord's staff) or pays another organisation to provide it. Your home does not count as supported housing if the support you receive has been arranged by a third party (such as the local authority social services department). For bedroom tax purposes your home does not count as supported housing if you are a council tenant
- 'temporary accommodation' is a temporary home provided by your local council because you are homeless so long as that home is not a council house or flat. The home provided must be owned by a private landlord or housing association or leased to the council from a private landlord on a short-term lease (ten years or less)
- 'child' means any child who normally lives with you (see 2.1 if you share the care with another parent). It also includes any young person (aged 16-19) who lives with you who you get child benefit for (or you could do) and who has not claimed benefit in their own right
- 'qualifying benefit' means the highest or middle rate of the care component of disability living allowance or the daily living component of personal independence payment.

The disputes process and time limits

You have two options to challenge a decision to apply the bedroom tax and they both have time limits:

- you can ask your council to reconsider its decision (a 'reconsideration'). You must do this within the time limit
- you can appeal. This means your challenge is decided by an independent tribunal. You must do this within the time limit.

In each case your request must be in writing. The council must receive your request within one month from the date it notified you of its decision – this is the date on the council's decision notice. If you do not apply within the time limit you may not receive your full arrears even if you win. If you ask for reconsideration and the decision is still unfavourable you can appeal the new decision in the same way as the original decision.

How to decide the basis for your appeal

Your chances of success improve considerably if you can identify the best approach in your case. There may be more than one reason why your decision is wrong and you will have a better chance of identifying them all if you work through a standard checklist. The standard checklist is in box 1 and you should work through each test in order.

Box 1: Standard appeal checklist

1. Are you exempt from the bedroom tax?
2. How many people live in your household?
 - Children (joint care)
 - Other occupiers (lodgers, non-dependants and so on)
3. How many bedrooms are you entitled to?
 - Disabled children
 - The general rules
 - Additional bedroom (carers and disability)
4. How many bedrooms are there in your home?
5. Do you qualify for time limited protection?
 - You could previously afford the rent (13 weeks)
 - You have been recently bereaved (52 weeks)

1. Are you exempt from the bedroom tax?

The bedroom tax only applies if your landlord is a 'registered housing association' or the 'local council' that pays your HB but even if they are you nevertheless are exempt from the bedroom tax if:

- you or your partner reached age 62 before 6 April 2014
- you have a shared ownership tenancy
- your landlord is a registered housing association and you live in 'supported housing'
- your landlord is a registered housing association and your rent has been referred to the rent officer as unreasonably high (because your HB is reduced to the rent officer's valuation instead)
- in England, your landlord is a profit making registered housing association and your tenancy is let at a market rent (because the local housing allowance applies to you instead)
- you have been housed by your local council in 'temporary accommodation'.

You are **partially** exempt from the bedroom tax if:

- you or your partner were born before 6 November 1952 (in which case you become exempt sometime within 2 months of your/ your partners 62nd birthday)
- you have been receiving HB at the same address since 1 January 1996 (in which case you were exempt for the 48 week period 1 April 2013 – 2 March 2014 but not thereafter)
- you are a joint tenant (in which case your bedroom tax deduction is shared between you and the other joint tenants).

2. How many occupiers?

The next stage is to check whether your council has properly taken account of all of the occupiers in your household so that your HB award has been based on the correct property size. All of the following occupiers in your home should be taken account of in the size calculation:

- you
- your partner
- any dependent children the council has taken account of in your HB award (i.e. included in your 'applicable amount')
- each joint tenant (who is not one of the above)
- any lodgers who pay you rent
- each non dependent (even if there are two who are part of a couple)
- any other person who occupies the dwelling as their home (e.g. a resident carer or au pair).

2.1 Children: separated parents, temporary absences and full-time students

If you share the care of a child with some one else (for example, your former partner/spouse) they cannot be included in both your and your ex-partner's claims at the same time. A child is included in your claim if they spend the majority of the time (each week) living with you. If you share the care equally the parent who receives child benefit 'wins' (and if no one gets child benefit, the council decides which household your child belongs to). Even though these rules discriminate against

you if you are the minority carer (or the carer without the child benefit), they are compliant with the Human Rights Act and therefore lawful (see TD v SSWP & Richmond LBC [2013] UKUT 642 (AAC) and JB v SSWP & Basingstoke & Deane BC [2014] UKUT 223 (AAC)).

Any child that has been included in your claim is treated as living with you during any period of temporary absence (for example, during the time they live with your ex-partner or if they are in hospital). If your child is a full-time student they are treated as part of your household (including as a non-dependant) if their main home is with you. There are no set rules concerning this: your council makes a decision based on the facts in your case, so the outcome may change as the facts change. For example, if your child is in their first year, living in halls of residence and returning home during the vacation then they are likely to be included in your claim. But this may change once they are in their second year and living independently.

2.2 Sons and daughters in the armed forces

If your son or daughter is a non-dependent who is a member of the armed forces away on operations and they intend to return home to you once their posting ends then they continue to be counted as a non-dependent in your claim during their absence (regardless of the rate of non-dependent charge that applies).

2.3 Foster children, children in local authority care and adoption

A foster child is not counted as part of your household (although you may be entitled to an extra bedroom when your council calculates your maximum property size – see the next section). If your child is in council care they are not included in your claim, but they are included if they live with you while under council supervision. A child that has been placed with you prior to their adoption is not included in your claim. A child becomes part of your household once you have adopted them.

2.4 Other occupiers (resident carers, au pairs)

Other people who live with you can be included in your household when the council calculates the size of home you need. This can be anyone whose main home is with you. It includes a resident carer (as opposed to a carer who stays overnight) whether or not you pay a fee for their service.

3. How many bedrooms are you entitled to?

Once you have identified all of the occupiers who should be included the council then works out how many bedrooms you are entitled to according to the following rules:

- a) allocate one bedroom for each disabled child that qualifies for a room of their own (3.1)
- b) allocate the appropriate number of bedrooms to the remaining occupiers according to the general rules (box 2)
- c) Add one or more additional bedrooms (3.3-3.4) if:
 - you are a foster parent; or
 - you have an overnight carer.

3.1 Disabled children who need a room of their own

A disabled child that lives with you qualifies for a room of their own if:

- the child receives the care component of disability living allowance at highest or middle rate; and
- your council is satisfied that it is not reasonable for that child to share a bedroom with another child because of their disability.

Each disabled child who meets these requirements qualifies for a room of their own. There is no equivalent rule for couples who cannot share and this does not breach the Human Rights Act (See R (MA and others) v SSWP [2013] EWHC 2213).

3.2 Calculating property size: the general rules

After allowing for the bedrooms required by any disabled children (if any) the appropriate size of property is then calculated for the remaining members of your household by following the general rules in box 2. The number of bedrooms calculated by these rules is added to the total bedrooms allowed for disabled children.

Box 2: Size criteria the general rules

One bedroom is allowed for each of the following, each occupier is counted only in the first category in which they fall:

- (1) You and your partner
- (2) Each other occupier aged 16 or over (such as non-dependants, whether or not they are part of a couple)
- (3) Two children aged under 16 who are of the same sex
- (4) Two children aged under ten (whether the same or the opposite sex)
- (5) Any other (unpaired) child.

Additional bedrooms

An additional bedroom is allowed if you are a foster parent or require an overnight carer. The maximum number of additional bedrooms you can qualify for is:

- one as a foster parent (section 3.3); plus
- one for an overnight carer (section 3.4).

If you are in a joint tenancy one in each category is allowed for each of your fellow joint tenants.

3.3 Additional bedroom: foster parents

You are entitled to an additional bedroom as a foster parent if:

- you or your partner has a child placed with you as a foster parent or prior to adoption; or
- you or your partner have been approved as a foster parent but have not yet received a placement (but in this case you only qualify for 52 weeks).

3.4 Additional bedroom: an overnight carer

You are entitled to an additional bedroom if you or your partner requires overnight care. You require overnight care only if:

- you or your partner receive a 'qualifying benefit' or you can provide your council with sufficient evidence to satisfy them that you require overnight care; and
- you can satisfy your council that you or your partner reasonably requires care; and
- you can satisfy the council that you have arranged for someone who is not part of your household to provide the overnight care; and
- you can satisfy your council that the person (or persons) you have arranged to provide the care:
 - is actually engaged in providing the care
 - regularly stays overnight for that purpose; and
 - is provided with a bedroom for that purpose which is additional to those used by the other occupiers, but if you and your partner sleep in separate bedrooms then this can be a living room if it is used by your carer to sleep in (see Bolton MBC v BF [2014] UKUT 48 (AAC)).

4. What counts as a bedroom?

This is probably the most contentious area and is likely to generate the greatest number of appeals. The legislation does not set a definition of when a room qualifies (or does not qualify) as a bedroom. But this does not mean that this is wide open or that every decision that is appealed is likely to be successful. There are many other areas of HB where there is no set definition, for example what counts as 'income' or 'capital' but this does not cause a problem for decision makers.

4.1 How judges will decide cases in bedroom disputes

The lack of a definition in legislation is a very common legal problem. So the rules about how judges should approach these cases are well established:

- a term that is undefined is usually given its ordinary everyday meaning – usually it's dictionary definition - but this does not mean it is the only meaning, particularly if applying it to every case leads to absurd results or clearly contradicts what Parliament intended
- the fact that Parliament decided to use an 'undefined familiar or ordinary English word' shows that it intended decision makers to take into account all of the facts on a case by case basis and not apply a fixed definition (SSWP v Nelson [2014] UKUT 525 (AAC))
- where 'bedroom' is defined in other legislation it cannot be assumed that it means the same thing. If Parliament had intended that definition to be used, the regulations would expressly say so (as they do in numerous other instances) (SSWP v Nelson)
- if a conflict arises with other legislation by interpreting the law one way but a different interpretation is possible that is consistent with both then the definition that reconciles the conflict is usually favoured
- judges avoid interpreting the law in a way that undermines the clear intention of Parliament (they cannot overturn or erode the bedroom tax just because it is politically contentious)
- the fact that a term is undefined means caution must be applied when applying previous judgments. A judge may decide that a room is not a bedroom in one case (for example, if it is too small to get a bed in) but that does not mean it is a fixed rule that applies to every case nor that it is the only consideration. Each case must be treated on its facts.

4.2 How should my council decide a bedroom dispute?

Your council is entitled to use its judgement when deciding a dispute over the number of bedrooms. In most cases it will be able to rely on evidence provided by the landlord – but your council must still make the decision itself. It is not bound by your landlord's classification of your home (but unless you provide other evidence it can rely on it). The ordinary meaning of 'bedroom' is 'a room which has a bed in or is used for sleeping in' (see Bolton MBC v BF [2014] UKUT 48 (AAC)). So if this applies the authority could rely on it. But it does not follow from this that just because a room is not used for sleeping in it cannot be a bedroom: see below.

There are at least three approaches that could be taken to decide whether a room is a bedroom (see SSWP v Nelson [2014] UKUT 525 (AAC)):

- a 'use' definition (similar to above – for example if the room is used for sleeping in or has a bed in it). But this cannot be the deciding factor in every case because it would lead to absurd results: it would mean that any room a child is sleeping in (no matter how small) must be a bedroom and that any unused or empty room could not be a bedroom
- a 'planning' definition – for example how is the room described on the original plans. If the room was originally designed as a bedroom and could be used as one by a child then it is very likely that it is a bedroom for bedroom tax purposes
- a 'letting' definition – if the landlord originally let the property or the tenancy agreement describes it as a three bedroom property then that is probably what it is.

It is important to grasp that the weight given to each of these factors will vary in each particular case (SSWP v Nelson). For example a 'use' definition would be less helpful if the room is empty.

4.3 How should I approach an appeal in a bedroom dispute?

A good test is to ask 'how would an independent observer describe my home? One, two or three bedrooms?' For example are there any similar properties advertised in the newspaper. If your home is on an estate with identical homes that are all described as three bedroom properties then that is probably what your home is (SSWP v Nelson).

4.4 What about overcrowding legislation and space standards?

The overcrowding legislation does not fix a definition of a bedroom for HB (see 4.1 above). And in any case instances where HB legislation is directly in conflict with the overcrowding legislation will be rare.

The overcrowding 'room standard' and 'space standard' both apply to the accommodation as a whole and living rooms as well as bedrooms count as available for sleeping in. In the space standard rooms are counted in increments of half a unit (from one half to two) by reference to their floor space. But provided the total number of persons (counting children under ten as one half and disregarding any child aged under one) does not exceed the total number of units for the dwelling as a whole the space standard is not breached: even if a particular room is used above its individual unit size (SSWP v Nelson).

However, where a room has a floor space of less than 50 square feet (which in the space standard is ignored) it is unlikely to be counted as a bedroom in any case. This is simply because it would most likely be too small to fit a bed in it (see 4.2). In fact, whether or not a room will fit a bed is not the only consideration. The room's height, ventilation, its natural and electric lighting or whether it has a window are all relevant. There should also be sufficient space around the bed so that you can get into it, open an outward opening door and provide some space for clothes (SSWP v Nelson). Equally, just because you do not breach the overcrowding rules it does not mean that your council must count every room as a bedroom – it must consider all the facts in each case (4.1).

5. Time limited protection

Even if you are under-occupying (in the bedroom tax sense) you may qualify for time-limited protection if:

- you could previously afford the full rent without help from HB
- a relative who lives in your home has died in the last 12 months.

The first protection (previously afford the rent) lasts for 13 weeks and the second lasts for 52 weeks.

5.1 Protection if you could previously afford the rent

This protection applies if you are making a new claim for HB and neither you nor your partner have received HB in the 52 weeks immediately before you made your claim.

If you qualify for this protection it lasts for 13 weeks. During the protection period your HB is calculated in same way as it would be if the bedroom tax did not exist.

5.2 Protection if a relative who lives in your home has died in the last 12 months

This protection applies if an occupier in your home who is a member of your 'family' or a 'relative' of you or your partner has died in the last 12 months and you have not moved home since the death occurred.

A member of your family means your partner or any child included in your HB claim. A 'relative' includes any other occupier who is not a member of your family (including a non-dependant, lodger or joint tenant) who is related to you or your partner in one of the following ways:

- parent, daughter, son, sister or brother
- parent-in-law, daughter-in-law, son-in-law, step-daughter or step-son (including the equivalent relations arising through civil partnership).

If you qualify for this protection it lasts for 52 weeks from the date of the death. During the protection period your HB is calculated in the normal way but the bedroom tax is calculated as if the deceased is still living with you. In other words it is assumed that you are entitled to the same size home while the protection lasts and the bedroom tax or the higher rate bedroom tax (25%) should not arise solely as a consequence of the death.